No. 89-1486



# In the Supreme Court of the United States

OCTOBER TERM, 1989

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ALBERT E. ACKROYD, PETITIONER

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR INDIAN SPRINGS STATE BANK

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly applied the principles of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), in holding that petitioner was estopped from asserting defenses based on alleged collateral agreements in the FDIC's action to collect on petitioner's facially unqualified promissory note.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-11A) is unreported. The opinion of the district court (Pet. App. 1B-21B) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on November 13, 1989. The petition for a writ of certiorari was filed on February 12, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On November 1, 1982, petitioner executed a promissory note payable to the Indian Springs State Bank (ISSB) in the face amount of $100,000. The note stated that it was due on demand, or, if no demand was made, on November 1, 1983. Petitioner executed a letter to ISSB, acknowledging that the loan was being made on the basis of his personal signature. Petitioner's purpose in securing the loan was to purchase interests in two limited partnerships, Haiku Partners and Haiku Holdings. ISSB made no agreements with petitioner regarding repayment of the note other than those set forth in note itself. Nevertheless, petitioner formed the impression, as a result of oral representations made by organizers of the Haiku partnerships, that he would not be required to pay the note, but that the partnerships would pay it. Pet. App. 4B-6B.

The partnerships failed to produce sufficient profits to pay the note within its one-year term, and the note fell into default. Following a demand upon petitioner for payment, ISSB brought suit against petitioner to collect the note's principal amount and the accrued interest. On January 27, 1984, ISSB was declared insolvent, and the FDIC was appointed receiver of the failed bank. As receiver of ISSB, the FDIC became the owner of all ISSB assets, including the note executed by petitioner. Pet. App. 3A, 8B.

2. After the FDIC was substituted as plaintiff in the action against petitioner, the district court granted the FDIC leave to file an amended complaint. The amended complaint sought contract damages arising from petitioner's failure to honor his note and tort damages resulting from his allegedly fraudulent acquisition of the loan. Pet. App. 4A, 8B-9B. The dis-

trict court granted summary judgment in favor of the FDIC on both claims. Relying on *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), the court held that petitioner was estopped from asserting his affirmative defenses against the FDIC as holder of the note because those defenses arose from a scheme or arrangement that would have tended to deceive the banking authorities. Pet. App. 2A, 9B-10B, 15B-17B.

4. The court of appeals affirmed the judgment in favor of the FDIC with respect to petitioner's contract liability on his note.[1] The court explained that under this Court's decision in *D'Oench*, the maker of a note is estopped from relying on affirmative defenses against the FDIC that arise from a scheme or arrangement to which the maker lent himself that would tend to mislead the banking authorities. Applying that principle, the court found that this case was "squarely" governed by *D'Oench*. Pet. App. 4A. Petitioner asserted that he had executed his note in reliance on oral representations that he would not be personally liable for payment and that the note would be rolled over for an additional year. The court pointed out, however, that "[t]he face of the note in this case clearly establishes the defendant's liability and does not in any way indicate the existence of a collateral agreement"; to permit petitioner to rely on such an agreement to vary the terms of the note would directly contravene the policy underlying

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[1] As to the fraud claim, the court of appeals reversed, holding that there was a genuine issue of material fact that precluded summary judgment. Because the FDIC could recover its full damages based on the judgment against petitioner on the note, however, the court ruled that a remand to adjudicate the fraud claim was unnecessary. Pet. App. 10A-11A.

*D'Oench* to protect federal banking agencies from unrecorded arrangements. Pet. App. 5A-6A.

The court also rejected petitioner's argument that "subsequent evidence"—a letter dated April 20, 1982, from ISSB's president to a Haiku general partner—demonstrated the existence of a written agreement to roll over the note. The court found that, contrary to petitioner's characterization, the bank president's letter did not set forth an "agreement" to renew the note; rather, the letter stated that it was within the bank's sole discretion to renew the loan for another year.[2] The court thus concluded that there was no written agreement to renew the note that would permit petitioner to avoid application of *D'Oench*. Pet. App. 6A-7A.

## ARGUMENT

Petitioner contends (Pet. 5-23) that the court of appeals incorrectly applied the principles of *D'Oench* in rejecting his reliance on alleged collateral agreements to avoid the payment of his note. Contrary to petitioner's contention, the court below correctly applied settled principles to a particular set of facts, and its holding does not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted.

1. In *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), this Court held that the maker of a promissory note cannot defend against the FDIC's enforcement of it when the maker has "lent himself to a scheme or arrangement whereby the banking authority * * * was or was likely to be misled." 315 U.S. at 460. In *D'Oench*, a bank had purchased bonds

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[2] The letter stated: "The loans to the limited partners will be made for one year and at the bank's discretion and the funds being available, the loans may be renewed for another year[.]" Pet. App. 7A.

that later went into default; to enable the bank not to show the past-due bonds on its books, the seller of the bonds gave the bank a promissory note on the understanding that the bank would not require payment. That understanding, however, was not reflected in the books of the bank; it was contained only in a receipt given to the maker. 315 U.S. at 454. After the FDIC acquired the note in a purchase-and-assumption transaction, the FDIC brought suit to enforce the note according to its terms. Relying on the "federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the * * * assets in the portfolios of the banks which [the FDIC] insures," the Court held that the maker of the note was barred from asserting against the FDIC the bank's agreement not to enforce the note. *Id.* at 457, 460-461.

Petitioner asserts that this case raises the broad question whether the FDIC is limited in its reliance on *D'Oench* to the situation in which the maker's defense rests on an "oral, secret, side agreement"; he contends that those conditions were not satisfied here. The facts of this case, however, reveal that no such sweeping issue regarding the scope of *D'Oench* is presented.

Petitioner offered two lines of defense to the payment of his facially unqualified note. First, petitioner claimed that he had been told by the organizers of the Haiku partnerships that he would not personally have to pay his note to the bank, or that the note would be rolled over. Pet. App. 4A, 4B-5B. There is no dispute, however, that those representations were oral and were not recorded in the books of the bank; consequently, the defense was barred under *D'Oench*, even as petitioner construes it. Indeed, the courts have consistently rejected defenses of borrowers based on alleged oral agreements concerning the enforce-

ability of promissory notes. See, *e.g.*, *FSLIC* v. *Lafayette Inv. Properties, Inc.*, 855 F.2d 196, 197-199 (5th Cir. 1988); *Andrew D. Taylor Trust* v. *Security Trust Fed. Savings & Loan Ass'n*, 844 F.2d 337, 342 (6th Cir. 1988); *FDIC* v. *Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985); *FDIC* v. *Investors Assocs. X., Ltd.*, 775 F.2d 152, 155-156 (6th Cir. 1985).

Petitioner's second theory relied on a letter written by the bank president to the partnerships' general partner discussing the possibility that the notes of the limited partners might be renewed. Petitioner's reliance on that document, however, is of no avail: the plain text of the letter does not constitute an agreement to renew his note. The letter merely states that "*at the bank's discretion and the funds being available*, the loans *may* be renewed for another year[.]" Pet. App. 7A (emphasis added). Thus, even if petitioner were given the benefit of the doubt, and the side letter from the bank to the partnership were somehow deemed part of an agreement with him, the letter itself grants him no immunity from personal liability and gives him no right to renewal of the note. Quite apart from *D'Oench*, therefore, petitioner's claimed "agreement," read according to its terms, affords him no defense to payment as required under the note. Against that background, the issues that petitioner raises regarding the asserted limitations of *D'Oench* are not presented by the record in this case.

In any event, petitioner's proposed limitations on the scope of *D'Oench* (oral, secret, side agreements) are incorrect on each count. Petitioner's initial requirement of an oral agreement is contradicted by the facts of *D'Oench* itself; there, the agreement was not oral but was reflected in writing (in a receipt provided to the maker of the note). Petitioner fares

no better with the other asserted requirements. The agreement need not be "secret" in the sense that the banking agencies lack all knowledge of it. Cf. *Langley* v. *FDIC*, 484 U.S. 86, 94 (1987) ("knowledge of the misrepresentation by the FDIC prior to its acquisition of the note is not relevant"; discussing 12 U.S.C. 1823(e), which codifies principles reflected in *D'Oench*). Nor need it be a "side" agreement. Petitioner does not explain in what sense he would apply this requirement, and we are unaware of his meaning. But the agreements in *D'Oench* (not to require repayment) and in *Langley* (to condition repayment on the truth of certain representations) were not "side" agreements in the sense of being unrelated to the terms of the note itself. Rather, they were intimately bound up in the transactions that produced the promissory notes; the makers were nevertheless estopped from asserting those aspects of their agreements with the banks against the FDIC. What *D'Oench* requires is not some formalistic list of characteristics of the maker's particular agreement; rather, *D'Oench* applies whenever the maker of the note has "lent himself to a scheme or arrangement that is likely to mislead the banking authorities[.]" *Langley*, 484 U.S. at 93.

2. Contrary to petitioner's claim, the decision below does not create a conflict in the circuits over the application of *D'Oench*. *FDIC* v. *Meo*, 505 F.2d 790 (9th Cir. 1974), cited by petitioner (Pet. 12-13), involved a borrower whose note was provided to a bank on the understanding that the bank would use the funds to purchase shares of the bank's stock; the bank, however, failed to do so. The court of appeals in that case found that the borrower was innocent of conduct amounting to a scheme or arrangement likely to mislead bank examiners. In contrast, petitioner here plainly lent himself to such a scheme or arrange-

ment by executing a note to obtain a personal $100,000 loan, yet simultaneously relying on the oral representations of a third party that he would not have any obligation to pay the note according to its terms. The narrow rule of *Meo*, designed to protect a borrower entirely innocent of negligence or wrongdoing, does not apply to petitioner.[3]

Several courts have stated that defenses flowing from a written contract that imposes bilateral obligations on the bank as well as the borrower are not cut off under *D'Oench*. See *Howell* v. *Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981); *FDIC* v. *McClanahan*, 795 F.2d 512, 515 (5th Cir. 1986) (dicta). Although petitioner, for the first time in these proceedings, asserts the existence of a "predevelopment loan agreement" between the bank and the Haiku partnerships (Pet. 17), this case did not involve defenses based on written, bilateral commitments. The FDIC's claim arose from petitioner's unilateral obligation to pay a sum certain on a promissory note. There was no bilateral obligation, documented or otherwise, running to petitioner from the bank.

Finally, petitioner relies (Pet. 18) on *FDIC* v. *Tennesseans for Tyree*, 886 F.2d 771, 775-777 (6th Cir. 1989), where the court held that an individual's claim that he executed a promissory note purely in a representative capacity was, in the context of that case, a defense that could be asserted notwithstanding *D'Oench*. As petitioner concedes (Pet. 19), he did not sign his note to ISSB in a representative

[3] Indeed, the Ninth Circuit, recognizing that *D'Oench* was intended broadly to cut off defenses that result from deceptive schemes or arrangements, has been reluctant to extend *Meo* beyond its distinctive facts. See *FDIC* v. *Bank of San Francisco*, 817 F.2d 1395, 1399 (1987); *FDIC* v. *First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (1978).

capacity; accordingly, the holding and rationale of *Tyree* have no application here.[4]

3. We also note that enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, has made petitioner's arguments academic with respect to his particular case. Section 212(a) of FIRREA makes applicable the requirements of 12 U.S.C. 1823(e) to claims or defenses asserted against the FDIC in its capacity as receiver of failed financial institutions. 103 Stat. 231. Section 1823(e), in turn, provides that no agreement that tends to diminish or defeat the FDIC's interest in any asset acquired by it from a failing or failed institution shall be valid against the FDIC, unless the agreement:

> (1) is in writing, (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e), as amended by FIRREA, § 217(4) 103 Stat. 256. See *Langley* v. *FDIC*, 484 U.S. 86 (1987). Petitioner's asserted agreements do not

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[4] Petitioner cites various district and bankruptcy court cases that he claims take a different view of *D'Oench* than did the court below. See, *e.g.*, *In re Longhorn Securities Litigation*, 573 F. Supp. 278 (W.D. Okla. 1983); *FSLIC* v. *Hunter (In re Hunter)*, 100 Bankr. 321 (Bankr. S.D. Tex. 1989). Whatever the correct analysis of those cases, they do not create a need for this Court's review.

satisfy these requirements, which now govern the defenses he asserted against the FDIC. See *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711 (1974).

Petitioner's oral representations from the Haiku partnerships are obviously invalid under Section 1823(e). The defenses asserted by virtue of the bank's letter to the partnership fare no better. The letter dated April 20, 1982, was not executed contemporaneously with the bank's acquisition of his promissory note, which is dated November 1, 1982. Nor does the record in this case indicate that the letter was approved by the bank's board of directors or its loan committee. Applying the standards of Section 1823(e), therefore, petitioner's defense cannot defeat the interest of the FDIC in collecting on his promissory note.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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